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Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-155

POTOMAC ELECTRIC POWER COMPANY,
Petitioner,

v.

PUBLIC SERVICE COMMISSION OF THE DISTRICT OF COLUMBIA,
WASHINGTON PUBLIC INTEREST ORGANIZATION,
Respondents.

On Petition For A Writ Of Certiorari To The District Of Columbia Court Of Appeals

RESPONDENT WASHINGTON PUBLIC INTEREST ORGANIZATION'S BRIEF IN OPPOSITION

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OPINIONS BELOW

Subsequent to the filing of the Petition, the Response of Associate Judge Ferren to the Separate Dissenting State-

ment of Associate Judge Nebeker was filed August 2, 1979. The Response is not yet reported and is reprinted, infra, at Appendix A.

RESTATEMENT OF THE CASE

Washington Public Interest Organization (WPIO) argued below that the rate-payers are entitled to the "'benefits' received upon sale (of real estate retired from service) in accordance with principles announced" in "similar litigation" in the Democratic Central Committee cases.[1/] (Petition, App.D at 35d).

1/ Democratic Central Committee of the District of Columbia v. WMATC, 158 U.S. App. D.C. 7, 485 F.2d 786 (1973); cert. denied 415 U.S. 935, 94 S.Ct. 1451 (1974) (DCC-I); Democratic Central Committee of the District of Columbia v. WMATC, 158 U.S. App. D.C. 107, 485 F.2d 886 (1973), cert. denied 415 U.S. 935, 94 S.Ct. 1451 (1974) (DCC-II); Leonard N. Bebchick v. WMATC, 158 U.S. App. D.C. 79, 485 F.2d 858 (1973).

The District of Columbia Court of Appeals did not allow the relief sought by WPIO "at this time". (Petition, App. D at 41d). However, the Court of Appeals held that rate-payers might on remand be entitled to the gains from sales of real estate retired from service.

Specifically, the Court of Appeals rejected Potomac Electric Power Company's ("PepCo") argument that the gain from the sale of real estate retired from service applied to the benefit of rate-payers was either an unconstitutional taking or an unconstitutional retroactive ratemaking. (Petition, App. D. at 41d et seq.)

Holding the proper test to be "an analysis of the impact of nonutility transactions on the price of the company's stock", (Petition, App.D at page 48d) the Court of Appeals remanded to re-

quire the Public Service Commission of the District of Columbia ("PSC") to make the appropriate analysis.

REASONS FOR DENYING THE WRIT

PepCo has presented three reasons for granting the writ. Two of these reasons (#1 that taking the gain on sale of land from PepCo is an unconstitutional "taking" and #2 that applying the gain on sale of land from PepCo is unconstitutional ratemaking) were the precise questions raised in the certiorari petition to this Court in the Democratic Central Committee cases, supra. That part of the issues in this case and Democratic Central Committee cases is identical. The result on those issues in the District of Columbia Court of Appeals in this case followed that in the United States Court of Appeals for the District of Columbia

Circuit in Democratic Central Committee.

The two questions above referred to were previously raised to this Court by the Petitioner as amicus curiae in support of petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit, D.C. Transit System, Inc. v. Democratic Central Committee of the District of Columbia, et al., No. 73-971, denied February 19, 1974.

The questions attempted to be raised to this Court here are markedly similar to the questions which were posed to the Court in the Democratic Central Committee case. The petitioner, D. C. Transit, posed the questions as follows. (No. 73-971, Petition, pp.2-3.)

1. Does denying to the owners of a utility's land the growth in

value of that land deprive them of property without due process of law, or constitute a "taking" of property for public use without just compensation in violation of the Fifth Amendment to the United States Constitution?

2. When a court retroactively reverses a utility commission's consistently applied treatment of land appreciation, recalculates the utility's income for all prior years based upon the court's new rule, and applies the recalculated income to the future, does the court violate the utility's guarantees of procedural due process in violation of the Fifth Amendment to the United States Constitution?

3. By overturning the long-

established accounting practice of a regulatory commission, which practice is universally accepted in public utility regulation and consistent with all legal precedent, has the United States Court of Appeals for the District of Columbia Circuit exceeded the legitimate scope of its reviewing authority?

PepCo's Motion for Leave to File Brief Amicus Curiae and Brief Amicus Curiae in Support of the Petition in No. 73-971, was granted February 19, 1979.

PepCo again attempts in the pending petition to obtain review of issues previously presented in a petition for a writ which was denied. The Petitioner has attempted to phrase its concerns with the order for remand proceedings in terms of constitutional significance. PepCo has not, however, re-

ferred in the Petition to its prior attempt to raise these matters in this Court. This further effort by PepCo to seek relief in this Court should also be denied. The District of Columbia Court of Appeals has remanded the case to the Commission pursuant to its appellate review authority under District of Columbia law.

The Petitioner has presented one reason for granting the writ, not raised in the Democratic Central Committee cases - the broadening of review. This is in no case a constitutional issue.

The Petitioner presents no grounds for the review in this Court of the decision of the District of Columbia Court of Appeals that the case be remanded to the Commission for proceedings necessary to present a complete record

for the appropriate appellate review. The law of the District of Columbia provides that the Court of Appeals of the District of Columbia, highest court of this jurisdiction, review Commission orders and the District of Columbia Court of Appeals has remanded the case for the purpose of establishing the record for the Commission's decision.

PepCo's disagreement with the guidelines for the remand does not provide the necessary grounds for review in this Court as required by Rule 19 of the Rules of the Court.

CONCLUSION

Upon the foregoing it is respectfully submitted that the Petition for a writ of certiorari should be

denied.

Respectfully submitted,

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Washington, D. C.

August 30, 1979

APPENDIX A

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 11780

WASHINGTON PUBLIC INTEREST ORGANIZATION, ET AL.,
PETITIONERS

v.

PUBLIC SERVICE COMMISSION OF THE
DISTRICT OF COLUMBIA, RESPONDENT,

WASHINGTON GAS LIGHT COMPANY, INTERVENOR.

No. 11786

PEOPLE'S COUNSEL, PETITIONER,

v.

PUBLIC SERVICE COMMISSION OF THE
DISTRICT OF COLUMBIA, RESPONDENT,

No. 12017

WASHINGTON PUBLIC INTEREST ORGANIZATION, ET AL.,
PETITIONERS

v.

PUBLIC SERVICE COMMISSION OF THE
DISTRICT OF COLUMBIA, RESPONDENT,

POTOMAC ELECTRIC POWER COMPANY, INTERVENOR.

393 A.2d 71 (1978)

Filed August 2, 1979

[1801-A]

FERREN, *Associate Judge*, with whom NEWMAN, *Chief Judge*, joins: Judge Nebeker's dissent filed July 17, 1979, suggests a need for the following brief response.

1. As to scope of review, the majority opinion specifically acknowledges that review of Commission orders is governed by the criteria set forth in the organic act creating the Commission. D.C. Code 1973, §§ 11-722, 43-705, -706. 393 A.2d at 75, 77 n.5. This court has stated, however, that the Commission has the responsibility "to present its decisions in a manner amenable to judicial review," *Telephone Users Ass'n v. Public Service Comm'n*, D.C.App., 304 A.2d 293, 300 (1973), *cert. denied*, 415 U.S. 933, 934 (1974). In this connection, we have held that, absent findings which satisfy certain requirements of the District of Columbia Administrative Procedure Act, D.C. Code 1978 Supp., § 1-1509(e), the case or record must be remanded for further proceedings. *Id.* at 301; *see Chesapeake & Potomac Telephone Co. v. Public Service Comm'n*, D.C.App., 339 A.2d 710, 712-14 (1975). Otherwise, we shall not be able to meet our review responsibilities under §§ 43-705, -706. This court, sitting en banc, has acknowledged that the Commission, in this case has not yet met the "rational connection" requirement under § 1-1509(e). 393 A.2d at 85; *Potomac Electric Power Co. v. Public Service Comm'n*, D.C.App., —— A.2d —— (No. 10490, May 14, 1979, slip op. at 12 n.5.) (en banc). *See generally Citizens Association of Georgetown, Inc. v. District of Columbia Zoning Comm'n*, D.C.App., —— A.2d —— (No. 12547, May 14, 1979 slip op. at 7-11, 14 & n.13).

2. The dissent criticizes the majority opinion for referring to "comparative stock prices" instead of "comparative rates of return" in discussing the Commission's use of a discounted cash flow (DCF) analysis. As used in this context, these respective terminologies reflect the

same concern: the minimum yield (reflected in the rate of return and/or the stock price) essential to continue attracting capital to the business, and thus to assure the company's financial integrity. Accordingly, the dissent does not affect the thrust of the majority's analysis and holding. On remand, the Commission has to decide (1) how, as a general rule, gains on land transactions shall be allocated, (2) what the impact in this case will be, if any, on the customer rate schedule, and (3) whether that impact will have any effect on the overall rate of return. It must also explain the reasoning behind each of these decisions.

We adhere to our position that "the overall rate of return is not directly at issue," 393 A.2d 79, and that the specific question, therefore, "is whether a portion of each company's prescribed returns should be deemed already paid" by returns on the land transactions. *Id.* This question cannot be answered, however, without deciding how gains on land which were formerly part of the rate base are related to the ratemaking process. 393 A.2d at 85 & n.16, 92-93.* If the Commission's decision on this question affects the overall rate of return, then that rate of return must be altered accordingly. We do not read the dissent to state otherwise.

In summary, because the Commission did not elaborate reasons for exempting the land gains from the ratemaking process, we must remand for clarification.

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* We do not understand the dissent's characterization of the overall rate of return as a "non-issue." Although, on one set of facts, the question of allocating gains on land transactions to the investors or the ratepayers will not necessarily affect the rate of return, it may be true, on another set of facts, that the allocation of such gains would have a depressing or enhancing effect on the company's ability to attract capital, thereby calling for an adjustment in the rate of return. *Id.* at 92.